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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1202

RIN 2590-AA44

Freedom of Information Act Implementation

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) issues this final regulation revising its existing Freedom of Information Act (FOIA) regulation. This final regulation provides procedures and guidelines under which FHFA and the FHFA Office of Inspector General (FHFA-OIG) will implement FOIA.

DATES: The final regulation is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: David A. Lee, FHFA Chief FOIA Officer, (202) 649-3058, david.lee@fhfa.gov (not a toll-free number), Federal Housing Finance Agency, 400 Seventh Street, SW., Eighth Floor, Washington, DC 20024. Please note that all mail sent to FHFA via the United States Postal Service is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly. The telephone

number for the Telecommunications Device for the Hearing Impaired (TDD) is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Interim Final Regulation

FHFA issued an interim final regulation on May 23, 2011 at 76 FR 29633 revising its 2009 FOIA regulation in various aspects. These revisions were necessary to provide procedures and guidelines under which FHFA and FHFA-OIG would implement FOIA, as well as to implement certain necessary updates and revisions to the 2009 regulation. FHFA solicited public comments on the interim final regulation for a 60-day period that ended on July 22, 2011.

II. Analysis of Comment Received and Final Regulation

FHFA received one comment letter in response to the interim final regulation from the National Archives and Records Administration's Office of Government Information Services (NARA). NARA recommended several changes to the interim final regulation. These changes are discussed below. Additionally, since the publication of the interim final regulation, FHFA has relocated its headquarters and its mailing address and contact information for the FOIA program has changed. As a result, FHFA will also be making technical changes to the regulation to include the new mailing address and telephone, and facsimile numbers for the FOIA program.

Section 1202.1—Why Did FHFA Issue This Regulation?

NARA suggested revising § 1202.1(c) to clarify how FHFA and FHFA-OIG will handle first-party access requests – i.e., a request for information about yourself – which are commonly submitted pursuant to the Privacy Act. FHFA and FHFA-OIG agree with

this recommendation and have revised the final regulation to clarify how first-party access requests will be handled.

Section 1202.2—What Do the Terms In This Regulation Mean?

NARA suggested adding definitions for the terms “FOIA Liaison,” “Fee Waiver,” and “Requester Category.” FHFA has revised the regulation to include definitions for the terms “FOIA Liaison” and “Fee Waiver.” As for NARA’s recommendation regarding the term “Requester Category,” FHFA and FHFA-OIG have incorporated three different categories into the definition of “Requester in the final regulation.” Therefore, a separate, stand-alone definition of “Requester Category” is unnecessary and has not been adopted in the final regulation.

NARA also suggested that clarifying language be added to the definition of “Direct Costs,” at least to the extent that such costs may relate to contract services costs. Since neither FHFA nor FHFA-OIG uses or contemplates using contract services to fulfill FOIA responsibilities, the term’s current definition is sufficiently descriptive and no further clarification is necessary, and none has been adopted in the final regulation.

NARA further suggested that the definition of “Unusual Circumstances” be revised to “differentiate between FHFA’s 12 Federal Home Loan Banks (FHLBanks) located across the country and an office that is on another floor or a few blocks away.” This comment suggests that the FHLBanks are units of FHFA. FHLBanks are not units of FHFA. FHFA regulates the FHLBanks, which are wholly private entities and therefore not subject to FOIA. Any reference in this final regulation to “other components” of FHFA or FHFA-OIG refers to offices within FHFA or FHFA-OIG, not to the FHLBanks.

As a result, such a revision is unnecessary and has not been adopted in the final regulation.

Section 1202.3—What Information Can I Obtain Through FOIA?

NARA recommended that § 1202.3(b) be revised to expand the universe of information a requester may obtain to include compilations of information contained in databases, “especially if a compilation can be produced through a few keystrokes.” FHFA and FHFA-OIG decline to make this change. NARA’s recommendation would require proactive disclosure of anything that might be produced electronically while imposing an undue burden, regardless of whether the requester sought it. However, if a requester seeks a compilation of information contained in databases, he or she may ask for it. This position is consistent with FOIA and with applicable case precedent. Therefore, FHFA and FHFA-OIG decline to adopt NARA’s suggested modification. FHFA, however, will be making technical changes to this section to update the contact information of the FOIA program to that of FHFA’s new headquarters.

Section 1202.4—What Information is Exempt from Disclosure?

NARA recommended that § 1202.4(d), which specifically concerns “[e]xempt and redacted material,” be revised to make plain that no itemized index of withheld materials needs to be provided to a requester “at the administrative stage of processing a request.” The current language of paragraph (d) complies with applicable statutory and precedential requirements for FOIA. Therefore, FHFA and FHFA-OIG decline to adopt NARA’s suggested modification.

Section 1202.5—How Do I Request Information from FHFA or FHFA-OIG Under FOIA?

NARA suggested that § 1202.5(c) through (g) be revised to indicate not that requesters “must” comply with the procedural requirements set forth therein, but that they merely “should” do so. FHFA and FHFA-OIG decline to adopt this recommendation. Establishing clear requirements minimizes ambiguity in processing and handling FOIA requests, and helps ensure that all requesters are treated equally. Therefore, FHFA and FHFA-OIG decline to adopt NARA’s suggested modification.

NARA also suggested that § 1202.5(d) be revised to indicate that requesters should attempt to identify their fee status, but not absolutely require that they do so. FHFA and FHFA-OIG agree and have made the suggested modification.

Additionally, FHFA will be making technical changes to this section to update the contact information of the FOIA program to that of FHFA’s new headquarters.

Section 1202.7—How Will FHFA and FHFA-OIG Respond to My FOIA Request?

In the interim final regulation, § 1202.7(c), Referrals to other agencies, provided that FHFA and FHFA-OIG refer requests that seek records originating in other agencies to that agency. It also provided that the requester be notified when such referrals occur. NARA recommended that § 1202.7(c) be revised to provide that FHFA and FHFA-OIG also notify requesters of what part of the request was referred, the name of the agency to which the request was referred, as well as the name of a contact at that agency to whom the requester may speak about the referred request. As a matter of procedure, FHFA provides this information to requesters but will include that procedure expressly in § 1202.7(c).

NARA also recommended that § 1202.7(d) be revised to designate the “search cut-off date” – i.e., the date of the request – as the date of search, on the presumption that

such a designation could “result in a much fuller search.” As a matter of policy, however, FHFA and FHFA-OIG consistently use the date on which each request is received as the date of search. Further, it is not evident that the recommended change would necessarily result in a “fuller” search. FHFA and FHFA-OIG elect to use their discretion on this point, and thereby decline to adopt NARA’s suggested modification.

Section 1202.9—How Do I Appeal A Response Denying My FOIA Request?

NARA suggested that § 1202.9(b) be revised to extend a requester’s deadline for appealing the agency response on a given request from 30 days to 45 or even 60 days. FOIA requires only a 30-day appeal window and FHFA and FHFA-OIG decline to extend it further.

NARA also suggested that § 1202.9 be amended by adding a new paragraph (g), which would require that requesters be advised of the services offered by NARA’s Office of Government Information Services (OGIS) services, and further informing the requester that FHFA and FHFA-OIG will work with OGIS to resolve disputes concerning responses to FOIA requests. Section 1202.9 of the final regulation has been amended to include a new paragraph (g), which advises requesters that they may consult the OGIS regarding disputes. However, current law does not require that such disputes be referred to the OGIS, which offers mediation services, but possesses no binding authority over either FHFA or FHFA-OIG with regard to information production or any other matter. NARA’s additional suggestions would commit FHFA and FHFA-OIG to take steps beyond those required by law that would unduly burden this process. Therefore, FHFA and FHFA-OIG decline to adopt NARA’s suggested modification.

Additionally, FHFA will be making technical changes to this section to update the contact information of the FOIA program to that of FHFA's new headquarters.

Section 1202.11—What Will It Cost to Get the Records I Requested?

NARA recommended that § 1202.11(a) be revised to provide requesters with a breakdown of all fees applicable to the FOIA process. This change is unnecessary, because paragraph (c) of this section directs requesters to FHFA's website for the most current fee schedule, to which FHFA-OIG also abides. Referring requesters to the website eliminates the need to update formally the regulation every time a fee changes. Therefore, FHFA and FHFA-OIG decline to adopt NARA's suggested modification.

NARA also recommended that § 1202.11(b) be modified to provide information on how FHFA would determine the electronic equivalent of 100 pages of duplication, for the purpose of assessing an applicable fee. FHFA and FHFA-OIG decline to confine themselves to any one method for making such a determination, since the nature and format of the responsive material will necessarily dictate how best to ascertain that material's relative "page length." Further, methods for making this determination are likely to change as technology develops, making a regulatory commitment to follow one method over another inadvisable. Therefore, FHFA and FHFA-OIG decline to adopt NARA's suggested modification.

NARA further recommended that § 1202.11(h) be revised to permit fee waivers "as a matter of administrative discretion." FHFA and FHFA-OIG decline to revise the existing language, which tracks the statutory and legal requirements of FOIA and provides for the even-handed treatment of all requesters. Therefore, FHFA and FHFA-OIG decline to adopt NARA's suggested modification.

Regulatory Impacts

Paperwork Reduction Act

The regulations in this part do not contain any information collection requirement that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation does not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)). FHFA has considered the impact of the regulation under the Regulatory Flexibility Act. FHFA certifies that the regulation is not likely to have a significant economic impact on a substantial number of small business entities because the regulation is applicable only to the internal operations and legal obligations of FHFA and FHFA-OIG.

List of Subjects in 12 CFR Part 1202

Appeals, Confidential commercial information, Disclosure, Exemptions, Fees, Final action, Freedom of Information Act, Judicial review, Records, Requests.

Authority and Issuance

Accordingly for the reasons stated in the preamble, the interim final regulation amending 12 CFR part 1202 that was published in the Federal Register at 76 FR 29633 on May 23, 2011 is adopted as a final regulation with the following changes:

PART 1202—FREEDOM OF INFORMATION ACT

1. The authority citation for part 1202 continues to read as follows:

Authority: Pub. L. 110–289, 122 Stat. 2654; 5 U.S.C. 301, 552; 12 U.S.C. 4526; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235; E.O. 13392, 70 FR 75373–75377, 3 CFR, 2006 Comp., p. 216–200.

2. Amend § 1202.1 by revising paragraph (c) to read as follows:

§ 1202.1 Why did FHFA issue this regulation?

* * * * *

(c) If you want to request information about yourself, this is considered a first-party or Privacy Act request under the Privacy Act (5 U.S.C. 552a), and therefore you should file your request using FHFA's Privacy Act regulations at part 1204 of this title. If you file a request for information about yourself, FHFA or FHFA-OIG will process this request under both FOIA and Privacy Act in order to give you the greatest degree of access to any responsive material.

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3. Amend § 1202.2 as follows:

a. Add definitions for the terms “Fee Waiver” and “FOIA Public Liaison” in alphabetical order; and

b. Revise the definition for the term “Requester”.

The additions and revisions read as follows:

§ 1202.2 What do the terms in this regulation mean?

* * * * *

Fee Waiver means the waiver or reduction of fees if the requester can demonstrate that certain statutory standards are met.

* * * * *

FOIA Public Liaison is a person who is responsible for assisting requesters with their requests.

* * * * *

Requester means any person seeking access to FHFA or FHFA-OIG records under FOIA. A requester falls into one of three categories for the purpose of determining what fees may be charged. The three categories are—

- (1) Commercial;
- (2) News media, scientific institution or educational; and
- (3) Other.

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§ 1202.3—[AMENDED]

4. Amend § 1202.3(c)(1) as follows:

- a. Remove the words “1700 G Street, NW., Fourth Floor, Washington, DC 20552” and add in their place the words “400 Seventh Street, SW., Eighth Floor, Washington, DC 20024”.
- b. Remove the words “1625 Eye Street, NW., Washington, DC 20006” and add in their place the words “400 Seventh Street, SW., Third Floor, Washington, DC 20024”.
- c. Remove the telephone number “(202) 414-6425” and add in its place the telephone number “(202) 649-3803”.
- d. Remove the telephone number “(202) 408-2577” and remove the e-mail address “bryan.saddler@fhfa.gov” and add in their place the telephone number “(202) 730-2824” and the e-mail address “bryan.saddler@fhfaoig.gov”.

5. Amend § 1202.5 as follows:

a. In paragraph (a) remove the words “1700 G Street, NW., Washington, DC 20552” and remove the facsimile number “(202) 414-8917” and add in their place the words “400 Seventh Street, SW., Eighth Floor, Washington, DC 20024” and the facsimile number “(202) 649-1073”.

b. Revise paragraph (d) to read as follows:

§ 1202.5 How do I request information from FHFA or FHFA-OIG under FOIA?

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(d) Your FOIA status. If you are submitting your request as a “commercial use” requester, an “educational institution” requester, a “non-commercial scientific institution” requester, or a “representative of the news media” for the purposes of the fee provisions of FOIA, your request should include a statement specifically identifying your status.

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6. Amend § 1202.7 by revising paragraph (c) to read as follows:

§ 1202.7 How will FHFA and FHFA-OIG respond to my FOIA request?

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(c) Referrals to other agencies. If you submit a FOIA request that seeks records originating in another Federal Government agency, FHFA or FHFA-OIG will refer your request or a portion of your request, as applicable, to the other agency for response. FHFA or FHFA-OIG will provide you notice of the referral, what portion of the request was referred, and the name of the other agency and contact information.

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7. Amend § 1202.9 as follows:

a. In paragraph (a) remove the words “1700 G Street, NW., Washington, DC 20552” and remove the facsimile number “(202) 414-8917” and add in their place the words “400 Seventh Street, SW., Eighth Floor, Washington, DC 20024” and the facsimile number “(202) 649-1073”.

b. Add paragraph (g) to read as follows:

§ 1202.9 How do I appeal a response denying my FOIA request?

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(g) Additional Resource. The National Archives and Records Administration (NARA), Office of Government Information Services (OGIS) offers non-compulsory, non-binding mediation services to resolve FOIA disputes. If you seek information regarding the OGIS and/or the services it offers, please contact the OGIS directly at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001, E-mail: ogis@nara.gov, Phone: (301) 837-1996, Fax: (301) 837-0348, Toll-free: 1-(877) 684-6448. This information is provided as a public service only. By providing this information, FHFA and FHFA-OIG do not commit to refer disputes to OGIS, or to defer to OGIS’ mediation decisions in particular cases.

Dated: January 24, 2012.

Acting Director, Federal Housing Finance Agency.

_ Edward J. DeMarco,

